Supreme Court, U.S.
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No. 97-34

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

DIANE HICKS,

Petitioner,

v.

WESTINGHOUSE MATERIALS COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of Ohio

BRIEF OF RESPONDENTS ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, AND INDUSTRIAL COMMISSION OF OHIO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondents Administrator, Bureau of Workers' Compensation, and Industrial Commission of Ohio agree for the most part with petitioner's statement of the case, as supplemented by respondent Westinghouse Materials Company.

REASONS WHY THE PETITION SHOULD BE DENIED

A. There Is No Lower Court Conflict of Authority.

As an initial matter, no lower court conflict of authority exists on the question presented. Petitioner has not shown, let alone alleged, that the lower courts have had, or are having, problems applying *Batson v. Kentucky*, 476 U.S. 79 (1986).

B. The Petition Does Not Present An Important Federal Question.

Nor, as the petition itself reveals, does this case present a novel or important federal question. It simply deals with a fact-bound application of settled law. *See Purkett v. Elem*, 514 U.S. 765 (1995). In essence all the petition complains about is the Ohio Supreme Court's factual determinations under *Batson* and *Purkett*, even though "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369 (1991). In the end the only issues in the petition are disputed issues of fact and an alleged misapplication of a settled rule of law, neither of which is an appropriate issue for this Court's discretionary review.

C. At All Events, All Three Ohio Courts Correctly Applied *Batson*.

At any rate, the lower courts correctly applied *Batson*. Counsel properly articulated a race-neutral explanation for the exclusion of Ms. Adams:

> Ms. Adams is an unemployed woman who has a very limited educational background. This is a case that involves some technical issues and medical testimony. We're concerned with the answers that we received yesterday that those issues require a certain level of education, a certain level of sophistication that may not be present in this particular juror * * * But we're making a determination based upon what we think is their ability to understand issues, watch their reactions to questions. And it's not just the questions that you ask; it's the reaction to other questions and their reactions to that * * *

T. at 577-579. Under the circumstances, it was appropriate for counsel to conclude that the education, employment background, sophistication, and demeanor of a prospective juror were important issues in a multi-week trial focused on issues related to potential radiation exposure in which ten experts would testify.

In light of the *Batson* challenge, the trial judge properly requested a race-neutral explanation from respondents, T. at 577, inquired as to the basis of that explanation as it compared with other potential jurors and jurors on the panel, T. at 579, and determined that no other jurors on the panel had less than a high school education. T.

at 581-582. The trial court's review of the juror's demeanor also was apparent during the discussion following the seating of the second alternate. T. at 589-593. Far from shirking his responsibilities under *Batson*, the trial court went beyond the explanation given by respondents and questioned whether Adams was treated any differently from other jurors. After finding that she was not, the trial judge stated that he believed that the proponent of the strike had met its burden. In fact, he gave further explanation when discussing the comparative alertness of the second alternate juror and Adams. Such considered judgment amply meets *Batson*.

In view of the trial court's ringside view of the proceedings, and the credibility-hinged nature of the inquiry, it is difficult to see why the normal discretion given to the trial court in these matters should not be respected. Since the trial court's findings are not clearly erroneous, they should not be overturned, *Hernandez v. New York*, *supra*, and need not be reviewed yet again.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should deny the petition.

Respectfully submitted,

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